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In The

Supreme Court of the United States

October Term, 1973

No. 73-1801

ARTHUR GOLDSTEIN,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF FOR RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

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BRIEF FOR RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The respondent, Commonwealth of Virginia, respectfully prays that a Writ of Certiorari to the judgment of the Supreme Court of Virginia entered in this case on March 4, 1974, reaffirming its prior ruling of July 11, 1972, and affirming the judgment of the Circuit Court of the City of Norfolk after consideration of the intervening decisions of this Honorable Court, not be granted.

OPINION BELOW

The judgment of the Supreme Court of Virginia is not reported but it is contained in the Appendix to the Petition for a Writ of Certiorari at page A. 3.

JURISDICTION

Petitioner asserts that the jurisdiction of this Court to issue the Writ of Certiorari is grounded upon 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

1. Is the Commonwealth of Virginia obscenity statute, Section 18.1-228 of the Code of Virginia, 1950, as amended, void for vagueness and overbreadth in violation of Petioner's rights under the *1st* and *14th Amendments* to the Constitution of the United States by virtue of this Court's decision in *Miller* v. *California, et als*, decided on the 21st day of June, 1973?

2. Are the items charged against Petitioner obscene in the constitutional sense and, therefore, not permitted protection under the law as it was applicable at the time of the sale?

3. Was it co..stitutionally necessary for the warrants to charge scienter and was there adequate affirmative proven evidence of scienter as is required by Due Process?

4. Does the State Court's utilization of a purely local contemporary community standard, as opposed to a statewide contemporary community standard violate Petitioner's rights under the *1st* and *14th Amendments* to the Constitution of the United States?

STATEMENT OF THE CASE

On December 8, 1970, Sergeant Leonard Merritt of the Norfolk Police Department went to Henderson's News Stand located at 311 Granby Street in the City of Norfolk, between 9:00 and 9:15 a.m. (T. 36-37, 89).* When he arrived the defendant and two customers were present and, after Merritt made some inquiry, the defendant selected a book from the bookshelf, thumbed through it, showed him pictures and stated "here is another good one with a lot of action and beaver hair" (T. 37, 44). The defendant specifically showed Sergeant Merritt certain of the photographs, and he then picked another book and made a similar statement (T. 46-47). The defendant picked out yet another book, entitled *The Homosexual Marriage*, asked if he knew men that liked men, thumbed through it and pointed out that it had several pictures "of men in action" (T. 47, 50-51). He picked out an additional book, entitled *The Lesbian, The Homosexual and The Bisexual* and said, "here is another good one with everything in it" (T. 51). The defendant finally picked up a movie, opened the box himself, took a still picture out and stated that "they eat each other in this movie" (T. 51-52). Sergeant Merritt purchased all of these items and, at the time, of the purchase, the defendant gave him a book of matches with an explicit photograph inside (T. 62). All of these items were introduced into evidence as Exhibit C-1, C-2, C-3, C-4, C-5 and C-7.

Sergeant Merritt also introduced into evidence certain photographs taken of the defendant's store on December 9th which showed that the store had open glass windows and sold general merchandise, including "hot dogs, paper

* For purpose of clarity, the petitioner will hereinafter be referred to as the defendant, and references to the trial transcript will be cited as (T. .....).

cups, travel emblems, air pistols, all sorts of things which are exposed to the public for sale, in addition to these things" (T. 65-81). The photographs also showed that several of the items purchased were in a glass show-case just 10 to 15 feet inside the front door of the defendant's store, and it was the first thing you saw when you entered the store (T. 79). The store was located on Granby Street in the heart of downtown Norfolk and, at the time that the photographs were taken, they had to get police officers to stop the heavy pedestrian traffic in front of the defendant's store so that the pictures could be taken (T. 80, 89). All of the items purchased by Sergeant Merritt were introduced into evidence and given to the jury with instructions that they should read through them and the film that he purchased was shown to the jury on a projector (T. 124, 127). Sergeant Merritt testified that the defendant thumbed through practically all of the items that he purchased and made comments as to the contents of the items in a suggestive manner (T. 116).

The rest of the testimony at the trial amounted to expert testimony regarding the community standards, and regarding the obscenity of the items introduced into evidence. Herbert Hugh Smith, Jr., was an Episcopal priest at the Church of the Advent in Ocean View in Norfolk and he had been a priest since 1958 and in Norfolk since 1960 (T. 129-130). During that period of time he had been engaged in a number of civic ventures and he had engaged in extensive discussions relative to obscenity with other professional people and members of the general public in numbers exceeding 1,000 (T. 131-133). Smith had read and seen all of the items introduced into evidence and he testified that the material that he examined had as its dominant theme an appeal to a prurient interest in sex, was also patently

offensive and contrary to contemporary community standards in its descriptions or representation of sexual matters, and was utterly without redeeming social value (T. 134-135, 160-165). It was his view that items should be considered obscene if they violated "the integrity of the individual by using him or her for hedonistic pleasure" (T. 180). This was his personal opinion and not his opinion as an expert. He felt that the pictures in each of the books were the predominant portrayal, and the text was not in any way supportive of the pictures. The two appeared almost to be unrelated. He felt that the text did serious damage to persons, particularly the one dealing with homosexuality which appeared to encourage homosexual marriages (T. 192).

Sam Theodore Barfield was the Commissioner of Revenue for the City of Norfolk and had lived in the City of Norfolk for 48 years (T. 231). At the time of trial he was in his second year as Commissioner of Revenue and prior to taking that office he had been on the Norfolk City Council for nine years (T. 231-232). He had been interested in the subject of pornography and obscenity since 1957 and for the eight years prior to trial he had spoken in excess of 148 times on the subject to civic groups containing well over 10,000 people in Norfolk and Virginia Beach (T. 232-234). He had also testified before committees of the General Assembly of Virginia and had appeared before the State Crime Commission. The previously referred to groups reflected the entire spectrum of society and many of them were from other parts of the country. He felt that the number of people that he had spoken before and with was closer to 20,000, and he had viewed or read all of the exhibits introduced (T. 246, 255-256). He felt that the items in question appealed to a prurient interest in sex and

were offensive to contemproary community standards. On cross-examination, he agreed that the nude figure was not obscene, but the manner of depiction would be the major determinant (T. 266). At the close of Barfield's testimony, the Commonwealth rested and a motion to strike the Commonwealth's evidence made by the defendant was overruled (T. 281-300).

Dr. Robert Maurice Doud, an Assistant Professor of Family Health and Population Dynamics and an Assistant Professor of Public Health and Tropical Medicine at Tulane University School of Medicine in New Orleans, Louisiana, testified on behalf of the defense (T. 302-303). He had traveled extensively throughout the country and was allowed to testify as to both local community standards and national community standards, although the trial judge ruled that the appropriate community standard was a local community standard (T. 312-339). Dr. Doud had reviewed all of the prosecution exhibits and was of the opinion that the books did not appeal to a sick or morbid interest in sex (T. 341-344). He stated that 98 per cent of the people in Norfolk would not be offended by the material, but on cross-examination he retreated some and indicated that the report of the President's Commission on Obscenity revealed that 98 per cent on a national survey felt that the presence of erotic material was not a major national problem when viewed in consonance with the problems of drugs, war, etc. (T. 346, 370, 380). He felt that all the material in question was all right because it would satisfy fantasies and had entertainment and curiosity satisfaction values which he felt were redeeming social values (T. 347-348, 357, 362, 366). He admitted that he was being paid for testifying and that he had testified previously in six prosecutions of obscene materials, and had always testified on behalf of the defendant (T. 353-356). Dr. Doud agreed that the

books were over-done and were sometimes vulgar and in bad taste (T. 383).

The Reverend Carl Esewein was the minister of the Norfolk Unitarian Church and had been in Norfolk for a period of six years (T. 386-389). He had had extensive discussions with people in Norfolk regarding the questions of pornography and obscenity and he felt that the items in question did not appeal to prurient interests, but merely satisfied curiosity (T. 388, 390, 398-401). He felt that all of the items had redeeming social values, but he had never seen any films or books that were without redeeming social values (T. 402-404). He did testify, however, that as to the contemporary community standards tests, these items were pretty much on the borderline and were perhaps 50-50 (T. 402). The defense further attempted to qualify an additional expert witness but the trial judge would not let him qualify (T. 405-416). Reverend David L. Cook was minister of the Bayview United Church of Christ in Norfolk and had been in Norfolk since February 1, 1970, which was about 16 months prior to the trial (T. 422-423). He had been involved in wide discussions relating to obscenity but most of these discussions had been with people from the Ocean View Area of Norfolk and none of them were of the Negro race (T. 424, 428, 432-433). He felt that the exhibits were all right and were entertaining, especially for those with sexual taboos (T. 435-442). On cross-examination he admitted that he had never seen any pictorial material that he thought was obscene, although he had attended the meeting of the Police-Community Relations Board in February of 1971 and at that time viewed the same materials and filled out a questionnaire indicating that he felt the items were obscene (T. 442, 448-449, 451). He agreed that the Police-Community Relations Board was set up on a precinct-by-precinct basis and included a couple of hun-

dred people from all walks of life in Norfolk (T. 458-459).

The case was tried before a jury and the jury was extensively and exhaustively instructed by the trial judge and, after deliberation, found the defendant guilty and sentenced him to pay a $5,000 fine. A motion to set aside the verdict of the jury was argued and overruled by the judge of the Corporation Court of the City of Norfolk on November 23, 1971. On July 11, 1972, the Supreme Court of Virginia denied and refused a Writ of Error on the ground that the Court believed "that there is no reversible error in the judgment complained of."

The petitioner filed a Petition for Writ of Certiorari to the Supreme Court of Virginia's judgment and, by order of June 25, 1973, this Honorable Court granted the Writ of Certiorari, vacated the judgment of the Supreme Court of Virginia and remanded the case for further consideration in light of several decisions rendered that same date. The Supreme Court of Virginia reconsidered its prior decision and, by order of March 4, 1974, reaffirmed its prior determination affirming the judgment of the Circuit Court of the City of Norfolk of November 23, 1971. This Petition for a Writ of Certiorari followed.

ARGUMENT

I.

The Virginia Obscenity Statutes Involved In The Prosecutions Herein, As Construed By The Supreme Court of Virginia, Both Prior To The Instant Case And In The Case of Price v. Commonwealth, 214 Va. 490, 201 S.E.2d 798 (1974), Are Both Facially Constitutional And As Applied To The Materials Depicting Or Describing Sexual Conduct As In This Case.

The two critical Virginia statutes involved in this matter are §§ 18.1-227 and 18.1-228 of the Code of Virginia

(1950), as amended. Those two sections are set forth below in their entirety for the convenience of the Court:

> § 18.1-227. *"Obscene" defined.*—The word "obscene" where it appears in this article shall mean that which considered as a whole has as its dominant theme or purpose an appeal to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters.
>
> § 18.1-228. *Production, publication, sale, possession, etc., of obscene items.*—Every person who knowingly:
>
> (1) Prepares any obscene item for the purposes of sale or distribution; or
>
> (2) Prints, copies, manufactures, produces, or reproduces any obscene item for purposes of sale or distribution; or
>
> (3) Publishes, sells, rents, lends, transports in intrastate commerce, or distributes or exhibits any obscene item, or offers to do any of these things; or
>
> (4) Has in his possession with intent to sell, rent, lend, transport, or distribute any obscene item, shall be guilty of a misdemeanor. Possession in public or in a public place of any obscene item as defined in this article shall be deemed prima facie evidence of a violation of this section.
>
> For the purposes of this section, "distribute" shall mean delivery in person, by mail, messenger or by any other means by which obscene items as defined in this article may pass from one person, firm or corporation to another.

In the initial decision in *Price* v. *Commonwealth*, 213 Va. 113, 189 S.E.2d 324 (1972), the Supreme Court of Virginia described the obscenity test to be utilized in Virginia in the following terms:

"As more recent decisions of the Supreme Court have reflected divergent opinions which failed to gain majority approval we have felt constrained to follow the definition of obscenity set forth in *Roth*, 354 U.S. at 489, 'whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.' *Roth* has been reaffirmed in *United States* v. *Reidel*, 402 U.S. 351 (1971). We have also acquiesced in the following amplification of the *Roth* definition set forth in a plurality opinion in *A Book Named 'John Cleland's Memoirs of a Woman of Pleasure'* v. *Massachusetts*, 383 U.S. 413, 418 (1966):

> ". . .[T]hree elements must coalesce: It must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

House v. *Commonwealth*, 210 Va. 121, 125, 169 S.E. 2d 572, 575 (1969). See *Hearn* v. *Short*, 327 F. Supp. 33, 36 (S.D. Tex. 1971) (Concurring opinion of Bue, J.)." (213 Va. at 115).

This exposition of the test for obscenity in Virginia in the *House* and *Price* cases amounts to a judicial construction of the definition of obscenity contained in § 18.1-227 of the Code of Virginia (1950), as amended, so as to preserve the constitutional viability of that Statute (See *Grove Press Inc.* v. *Evans*, 306 F. Supp 1084, 1086 (E.D. Va. 1969)). It is unquestioned that up until the decisions of this Honorable Court in June of 1973, this was the test for obscenity approved by Your Honors. The essential question then becomes whether the decisions in *Miller* v. *California*, 413

U.S. 15 (1973); *Paris Adult Theater I* v. *Slaton*, 413 U.S. 49 (1973); *Kaplan* v. *California*, 413 U.S. 115 (1973); *United States* v. *12 200-Ft. Reels of Super 8-mm. Film*, 413 U.S. 123 (1973); *United States* v. *Orito*, 413 U.S. 139 (1973); *Heller* v. *New York*, 413 U.S. 483 (1973); *Roaden* v. *Kentucky*, 413 U.S. 496 (1973); *Alexander* v. *Virginia*, 413 U.S. 836 (1973), so drastically changed the state of the law as to make the test applied to this case in the Corporation Court for the City of Norfolk, Virginia, constitutionally deficient.

It may be useful at this point to quote a lengthy portion of Chief Justice Burger's opinion for this Court in *Miller*, *supra*, to set forth the parameters of valid constitutional enforcement of obscenity laws:

> "The basic guidelines for the trier of fact must be: *(a) Whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, Kois* v. *Wisconsin, supra*, 408 U.S., at 230, 33 L.Ed.2d 312 (1972), quoting *Roth* v. *United States, supra*, 354 U.S., at 489, 1 L.Ed.2d 1498 (1957), *(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law*, and *(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.* We do not adopt as a constitutional standard the '*utterly* without redeeming social value' test of *Memoirs* v. *Massachusetts, supra*, 383 U.S., at 419, 16 L.Ed.2d 1 (1966); that concept has never commanded the adherence of more than three Justices at one time. . . . If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary [citations omitted].

"We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under the second part (b) of the standard announced in this opinion, supra:

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

"(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

"Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places. At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political or scientific value to merit First Amendment protection. [citations omitted] ...." (413 U.S. at .....; emphasis supplied.)

It is evident that the tests newly articulated by Your Honors in *Miller* differ from the tests described by the Supreme Court of Virginia in the *House* case and in its initial decision in the *Price* case in only two respects. The first of these is a substitution of the terminology as to whether the work, "taken as a whole, lacks seriously literary, artistic, political or scientific value" as opposed to the standard described by the Supreme Court of Virginia as a plurality determination in *A Book Named 'John Cleland's Memoirs of a Woman of Pleasure'* v. *Massachusetts*, 383 U.S. 413 (1966), that the work must be "utterly without redeeming social value." This substitution, contrary to the argument made by petitioner in this proceeding, is not of constitutional dimensions. In

Miller, Your Honors did not hold the "utterly without redeeming social value" test to be unconstitutional but you merely recognized the obvious fact that it was practicably unworkable, and a more rational test was substituted therefor. The new test is far less restrictive than the earlier *Memoirs* tests and imposes a lighter burden on the prosecution. The second change made by Your Honors in *Miller* was to explicitly limit the application of these tests to materials which depict or describe "in a patently offensive way, sexual conduct specifically defined by the applicable state law." The second alteration is not actually a change in the test but is merely a clearer delineation of the type of materials to which the test may be applied.

Applying the *Miller* standards to the instant case, it is clear, first, that the materials in this case are clearly lacking in "serious literary, artistic, political, or scientific value" since the jury in the Corporation Court for the City of Norfolk and the Supreme Court of Virginia have found that the materials were "utterly without redeeming social value," a much harsher standard. Secondly, did the materials in question in this case depict or describe "in a patently offensive way, sexual conduct"? The Supreme Court of Virginia in its action on remand by this Honorable Court obviously resolved that question against the petitioner herein.

The only remaining question, then, is whether the Supreme Court of Virginia properly applied the *Miller* tests, if in fact they were substantially new tests, to this conviction which preceded the *Miller* decision. First, as previously pointed out, the only newness in the test is a change regarding the social value of the materials in question and that change is to the detriment of the petitioner here. The judgment affirmed by the Supreme Court of Virginia in its

initial decision was predicated on a test that created a much more extensive burden for the Commonwealth than does the *Miller* test with regard to "social values." Thus, this petitioner had the benefit of a more restrictive test and has no standing to complain with regard to this change (See *Price* v. *Commonwealth, supra,* 214 Va. at 494. The other variation was not in the test but in the description of the materials to which the tests could be constitutionally applied and the Supreme Court of Virginia obviously in its second decision considered the materials herein in light of the *Miller* test.

In addition, the recent decision of this Honorable Court in *Hamling* v. *United States,* ..... U.S. ....., 15 Cr.L. Rptr. 3239 (1974), clearly renders any argument regarding the constitutionality of Virginia statute frivolous because the Federal statute, 18 U.S.C. § 1461, involved in that case was not nearly as specific as §§ 18.1-227 and 18.1-228 of the Code of Virginia. Consequently, the statutes involved in this case are constitutional on their face and are additionally constitutional as applied to the materials involved herein.

II.

The Materials Involved In The Instant Case Are Clearly Obscene As a Matter Of Law And As A Matter Of Fact And The Jury And The Courts Below Were Clearly Correct In Their Conclusions To That Effect.

The cases relied on by petitioner in the instant Petition for a Writ of Certiorari were all decided prior to the decision of this Court in *Miller* v. *California, supra,* and the other decisions decided at the same time and the cases cited in the Petition for a Writ of Certiorari have diminished value as precedents, if indeed they have any value whatsoever. In addition, a review of the materials herein in light of the

recent decision of this Court in *Jenkins* v. *Georgia*, ... U.S. ....., 15 Cr.L.Rptr. 3259 (1974), will also result in the conclusion that the materials are obscene as a matter of law and as a matter of fact.

III.

The Petitioner Does Not Demonstrate In What Regard The Arrest Warrants Were Fatally Defective Where There Is No Claim Made In The Petition For A Writ Of Certiorari That The Instructions Given To The Jury Were Inadequate Or That The Petitioner Was Not Advised As To The Nature Of The Charges Against Him Or Which Specific Obscene Items He Was Charged With Selling.

The arrest warrant in question is set forth in its entirety at Appendix A. 1 to the Petition for a Writ of Certiorari and it states that the accused "did unlawfully Vio. Sec. 18.1-228 of the State Code of Virginia as amended to-wit; Sale and possession with the intent to sell obscene items." Section 18.1-228 of the Code clearly requires proof of scienter as it states that the prohibited acts in question must be done "knowingly." It is clear under Virginia law that an arrest warrant need not be as specific as an indictment, and it is sufficient if it fairly informs the defendant as to what allegation he must be prepared to meet in the preparation of his defense. There was certainly no question here that the petitioner knew what he was being charged with, and what items he was charged with having sold. As a matter of fact, the defense witnesses at trial all had an opportunity to view and read the items in their entirety prior to trial. The arrest warrant generally is phrased within the terminology of the statute and the petitioner here need only have referred to the statute, as he obviously did, to determine the precise nature of the offense. Counsel for the defendant admitted early in the case that he had been sup-

plied all the specifics of the charge (T. 42-43). In addition, the petitioner does not here raise any questions regarding the adequacy of the instructions that were given to the jury and these allegations are clearly without merit, if not indeed frivolous.

IV.

The Supreme Court Of Virginia Properly Has Ruled That The Appropriate Community Standard To Be Applied In An Obscenity Case Is A Local Community Standard As Opposed To A State-Wide Or National Community Standard.

In its initial decision in the case of *Price* v. *Commonwealth, supra*, the Supreme Court of Virginia made the following statement:

> "Price's assignment of error to the lower court's ruling that the contemporary standard in issue was that of the local community rather than that of the national or state-wide community has been resolved against him by *Alexander* v. *Commonwealth*, 212 Va. 554, 186 S.E.2d 43 (1972). There, noting that the Supreme Court had not been able to agree on a definition of the community by whose standards obscenity should be measured, we approved the local community standard" (213 Va. at 115)

Upon the remand of the *Price* case, the Supreme Court of Virginia again considered the contention that the community was a national or state-wide community and the Court reiterated its prior view in the following terms:

> "*Miller* and *Paris Adult Theatre I* support our holding in *Price*, following *Alexander* v. *Commonwealth*, 212 Va. 554, 186 S.E.2d 43 (1972), that the community standard to be applied is that of the locality rather than that of the state or nation. Although *Miller* had no occasion to consider whether the use of local

standards was constitutionally permissible, it held that national standards were not constitutionally required and that state standards were constitutionally acceptable. In reaching this result the court noted that the diversity of our nation would prevent the effective formulation of a national standard of obscenity. 413 U.S. at 30. The court also relied on the Anglo-American tradition of allowing lay jurors to draw upon the standards of their community. *Id.*

The reasons given in *Miller* for holding that national standards are not constitutionally required in obscenity cases compel the same conclusion with respect to statewide standards. It would be difficult, if not impossible, for a Virginia jury to formulate a statewide standard of obscenity, for our state comprises communities with a vast diversity of life styles. Materials which do not offend the community standards of our metropolitan areas might well be regarded as obscene by the standards of some of our rural communities. Moreover, Virginia juries have traditionally relied on local rather than statewide community standards. *See, e.g., Easterling* v. *Walton*, 208 Va. 214, 218, 156 S.E.2d 787, 790 (1967), which restated the rule that a jury must apply local community standards in medical malpractice cases.

In *Paris Adult Theatre I* the Supreme Court rejected the contention that expert evidence of obscenity is required when the motion picture or other material is placed in evidence, 413 U.S. at 56, a ruling that we had anticipated in *Price*. This ruling reinforces our conclusion that local community standards may be applied, for expert testimony would be required to establish statewide standards. *See Miller*, 413 U.S. at 31." (214 Va. at 491-492).

As the Supreme Court of Virginia stated, the decision of this Honorable Court in *Miller* would appear to support the Supreme Court of Virginia's contention when Your Honors stated the following:

> "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City." (413 U.S. at ....).

Your Honors also appear to approve a local community standard when you recognized that "[t]he adversary system, with lay jurors as the usual ultimate factfinders in criminal prosecutions has historically permitted triers-of-fact to draw on the standards of their community. . . ." (413 U.S. at .....). This language would clearly appear to approve a local standard and it's respectfully submitted that the Supreme Court of Virginia's description of the appropriate community is correct.

Any question regarding the correctness of the Virginia Supreme Court's view regarding the application of a local community standard as opposed to a statewide or national community standard has been resolved by the recent decisions of this Honorable Court in *Hamling* v. *United States, supra*, and *Jenkins* v. *Georgia, supra*. In the *Hamling* case your Honors held the following:

> "We think that both of these contentions evidence a misunderstanding of our *Miller* holdings. *Miller* rejected the view that the First and Fourteenth Amendments require that the proscription of obscenity be based on uniform nationwide standards of what is obscene, describing such standards as 'hypothetical and unascertainable,' 413 U.S., at 31. But in so doing the Court did not require as a constitutional matter the substitution of some smaller geographical area into the same sort of formula; the test was stated in terms of the understanding of 'the average person, applying contemporary community standards.' 413 U.S., at 24. When this approach is coupled with the reaffirmation in *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 56

(1973), of the rule that the prosecution need not as a matter of constitutional law produce 'expert' witnesses to testify as to the obscenity of the materials, the import of the quoted language from *Miller* becomes clear. *A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law. Stone* v. *New York, Chicago & St. Louis R. Co.*, 344 U.S. 407, 409 (1953); *Schultz* v. *Pennsylvania R. Co.*, 350 U.S. 523, 525-526 (1956). Our holding in *Miller* that California could constitutionally proscribe obscenity in terms of a 'statewide' standard did not mean that any such precise geographic area is required as a matter of constitutional law.

Our analysis in *Miller* of the difficulty in formulating uniform national standards of obscenity, and our emphasis on the ability of the juror to ascertain the sense of the 'average person, applying contemporary community standards' without the benefit of expert evidence, clearly indicates that 18 U.S.C. § 1461 is not to be interpreted as requiring proof of the uniform national standards which were criticized in *Miller*. In *United States* v. *12 200-ft. Reels of Film*, 413 U.S. 123 (1973), a federal obscenity case decided with *Miller*, we said:

> 'We have today arrived at standards for testing the constitutionality of state legislation regulating obscenity. See *Miller* v. *California*, *ante*, at 23-25. These standards are applicable to federal legislation.' *Id.*, at 129-130.

Included in the pages referred to in *Miller* is the standard of 'the average person, applying contemporary community standards.' In view of our holding in *12 200-ft. Reels of Film*, we hold that 18 U.S.C. § 1461 incorporates this test in defining obscenity.

> The result of the *Miller* cases, therefore, as a matter of constitutional law and federal statutory construction, is *to permit a juror sitting in obscenity cases to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion 'the average person, applying contemporary community standards' would reach in a given case.* Since this case was tried in the Southern District of California, and presumably jurors from throughout that judicial district were available to serve on the panel which tried petitioners, it would be the standards of that 'community' upon which the jurors would draw. But this is not to say that a District Court would not be at liberty to admit evidence of standards existing in some place outside of this particular district, if it felt such evidence would assist the jury in the resolution of the issues which they were to decide." (15 Cr.L.Rptr. at 3244; emphasis supplied).

Your Honors were even more specific in the *Jenkins* case in the following lanugage:

> "We agree with the Supreme Court of Georgia's implicit ruling that the Constitution does not require that juries be instructed in state obscenity cases to apply the standards of a hypothetical statewide community. *Miller* approved the use of such instructions; it did not mandate their use. What *Miller* makes clear is that state juries need not be instructed to apply 'national standards.' We also agree with the Supreme Court of Georgia's implicit approval of the trial court's instructions directing jurors to apply 'community standards' without specifying what 'community.' *Miller held that it was constitutionally permissible to permit juries to rely on the understanding of the community from which they came as to contemporary community standards,* and the States have considerable latitude in framing statutes under this element of the *Miller* decision.

> A State may choose to define an obscenity offense in terms of 'contemporary community standards' as defined in *Miller* without further specification, as was done here, or it may choose to define the standards in more precise geographic terms, as was done by California in *Miller*." (15 Cr.L.Rptr. at 3260; emphasis supplied).

Consequently, the Virginia Supreme Court quite properly ruled that the appropriate community standards could be the standards of the local community, which was the community from which the jury was drawn.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert E. Shepherd, Jr., Assistant Attorney General of Virginia, counsel for the respondent in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on or before the 28th day of August, 1974, I mailed three copies of the

foregoing brief for the respondent in opposition to the granting of a petition for a writ of certiorari to Robert S. Cohen, Esquire and Samuel Goldblatt, Esquire, Suite 804, One Main Plaza East, Norfolk, Virginia 23510, counsel of record for petitioner.

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